No. 89-758

Supreme Court, U.S.
FILED
JAN 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

DEPARTMENT OF THE TREASURY,
OFFICE OF CHIEF COUNSEL AND
NATIONAL TREASURY EMPLOYEES UNION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

WILLIAM E. PERSINA *
Solicitor

ARTHUR A. HOROWITZ
Associate Solicitor

ROBERT J. ENGLEHART
JAMES F. BLANDFORD
Attorneys
Federal Labor Relations Authority
500 C Street, SW.
Washington, D.C. 20424
(202) 382-0781

* Counsel of Record

TABLE OF AUTHORITIES

Cases: Page

Department of Justice v. *FLRA*, 709 F.2d 724 (D.C. Cir. 1983) 4, 5

United States v. *Fausto*, 484 U.S. 439 (1988) 2, 3, 4

Statutes:

The Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135 (1988) .. 3

5 U.S.C. 7103(a)(2) 6

5 U.S.C. 7103(a)(9) 6

5 U.S.C. 7112(b) 6

5 U.S.C. 7121(a) 6

5 U.S.C. 7121(e) 5, 6, 7

5 U.S.C. 7121(f) 6

5 U.S.C. 5596 4

5 U.S.C. 5596(b)(1) 4

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-758

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

DEPARTMENT OF THE TREASURY,
OFFICE OF CHIEF COUNSEL AND
NATIONAL TREASURY EMPLOYEES UNION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Respondent, Department of the Treasury, argues (Resp. Br. 7-8) that the decision of the court of appeals does not warrant review by this Court essentially for three reasons.[1] First, Treasury claims that

[1] Respondent's brief also is directed to the petition for a writ of certiorari filed by the National Treasury Employees Union (NTEU) in *NTEU* v. *Department of the Treasury, Office of Chief Counsel*, petition for cert. pending, No. 89-610. The NTEU certiorari petition seeks review of the same D.C. Circuit judgment at issue in the instant case.

the court of appeals correctly analyzed the relevant statutory provisions and did so consistently with this Court's decision in *United States* v. *Fausto*, 484 U.S. 439 (1988). Second, Treasury notes that the decision below is consistent with another court of appeals decision on the issue. Finally, Treasury suggests that the decision does not merit review because Congress is currently considering legislation that would effectively resolve the matter at issue here. However, for the reasons stated in the Authority's petition for a writ of certiorari, and for the reasons stated below, the issue presented should be decided by this Court.

1. While it is true that currently there is no split in the circuits on this issue, the granting of certiorari nevertheless is clearly warranted in this case. Both the decision below and that of the Seventh Circuit extensively rely on this Court's decision in *Fausto*. As argued in our petition for a writ of certiorari (Pet. 18-27) and as discussed briefly below, the court of appeals, as well as the Seventh Circuit, misapplied *Fausto* to the issue here, and by doing so affected the right of hundreds of thousands of federal employees to grieve and arbitrate serious disciplinary actions taken against them by their employing agencies, including the ultimate sanction of removal from their positions. Since the decision below was premised on the misapplication of this Court's decision, review is plainly warranted.

2. a. Respondent mistakenly characterizes this Court's holding in *Fausto* as precluding any review outside the employing agency of disciplinary actions taken against excepted service employees, noting that the Court specifically referenced the exclusion of "administrative" as well as judicial review (Resp. Br.

10 and n.8).[2] In the first place, the Court in *Fausto* was faced only with the question of whether a nonpreference eligible member of the excepted service may obtain, under the Tucker Act, judicial review of disciplinary actions where the Civil Service Reform Act (CSRA) does not provide a right of review. 484 U.S. at 443. As Treasury recognizes (Resp. Br. 8), the Court relied on the exclusivity of the remedies provided by the CSRA for excepted service employees in concluding that no remedy outside the CSRA survived after its enactment. As noted in the Authority's petition (Pet. 12), the remedy at issue here, the negotiated grievance and arbitration procedures, are not outside the CSRA, but rather are rights conferred upon employees in the CSRA itself. The issue in this case is whether Congress's withholding from excepted service employees of appeal rights to the Merit Systems Protection Board (MSPB) in one chapter of the CSRA is sufficient evidence of congressional intent to negate their right to grievance and arbitration procedures granted in another chapter of the same comprehensive act.[3] This is a question the *Fausto* Court did not consider and therefore should be answered now by this Court.

In its brief, Treasury finds evidence for a broad reading of *Fausto* in the Court's reference to the absence of "administrative" remedies available to excepted service employees (Resp. Br. 10 n.8). How-

---

[2] Unless otherwise noted, the term "excepted service employees" refers only to nonpreference eligible excepted service employees, that is, those who are without the right to appeal disciplinary actions to the Merit Systems Protection Board.

[3] The grievance and arbitration provisions are found in the Federal Service Labor-Management Relations Statute ("the Statute"). The Statute was enacted as Title VII of the CSRA.

ever, it is evident that the Court in *Fausto* did not have the negotiated grievance and arbitration procedures in mind when it referred to administrative remedies. When the Court in *Fausto* concluded that the Court of Claims is not an "appropriate authority" under the Back Pay Act, 5 U.S.C. 5596, it limited its discussion of appropriate authorities contemplated by the Back Pay Act to the agency itself, the MSPB, or the Federal Circuit. 484 U.S. at 454. There has never been a dispute that third parties having jurisdiction over collective bargaining disputes (arbitrators or the Authority, for example) also are appropriate authorities under the Back Pay Act.[4] The absence of any reference to them in *Fausto*'s discussion of appropriate authorities strongly suggests that the *Fausto* Court simply did not consider the role of grievance arbitration in connection with challenges by excepted service employees to disciplinary actions taken against them.

b. Contrary to Treasury's arguments (Resp. Br. 13), the decision of the court of appeals also misapplies its own decision in the "probationary employees" case, *Department of Justice* v. *FLRA*, 709 F.2d 724, 728-29 (D.C. Cir. 1983), to the issue in this case. The court of appeals concluded in the probationary employees case that congressional intent with respect to the status of probationary employees required their exclusion from the Statute's full griev-

---

[4] Where the Court in *Fausto* quotes from the relevant section of the Back Pay Act, 5 U.S.C. 5596(b)(1), it omits the parenthetical language which brings determinations concerning unfair labor practices and grievances within its scope. 484 U.S. at 454. This constitutes further evidence that the Court's opinion in *Fausto* did not address the applicability of the grievance and arbitration provisions of the Statute to excepted service employees.

ance procedure rights. But in order to reach such result, that court first concluded that Congress clearly expressed its intention not "to allow any shackles whatever to be placed on agency decisions concerning termination of probationary employees for unacceptable work performance or conduct," and that "Congress *affirmatively* preserved the agencies' right to discharge summarily a probationary employee for unacceptable work performance." 709 F.2d at 729 (emphasis in original). The same cannot be said about excepted service employees, and the court of appeals makes no attempt to say so. In sum, the court's casual dismissal of the terms of the Statute as "definitional" in this case cannot be squared with the clear and unmistakable proof of congressional intent that the court marshalled before denying full grievance arbitration rights to probationary employees.[5]

c. Further, Treasury and the court of appeals also misconstrue the Authority's arguments concerning the reference to "other personnel systems" in Section 7121(e) of the Statute. The court below rejected the Authority's argument by noting that excepted service employees are part of the "main civil service system," and therefore provisions relating to "other

---

[5] The provisions in the Statute that bring major disciplinary actions within the scope of grievance arbitration for nonpreference eligible excepted service employees are, regardless of how they are characterized, the same provisions of the Statute which bring major disciplinary actions within the scope of grievance arbitration for preference eligible and competitive service employees. No one argues that the arbitration rights for preference eligible and competitive service employees are not rights specifically conferred by the Statute just because they flow from what the court of appeals characterized as "broad definitional provisions in the statute."

personnel systems" are simply not applicable. Pet. App. 13a-14a. But the Authority has never claimed that these provisions concerning "other personnel systems" are intended to apply to excepted service employees or that they confer any review rights for employees. Rather, these provisions address how the grievance arbitration rights, which exist by virtue of other provisions in the Statute (see Sections 7103 (a)(2), 7103(a)(9), 7112(b) and 7121(a)), should be harmonized with an employee's alternate appeal rights. See Pet. 17-18.[6]

Section 7121(e) is, nonetheless, crucial to an understanding of the reach of the Statute's adverse action grievance arbitration rights. In seeking to harmonize employees' other appellate options with their right under the Statute to grievance arbitration, Section 7121(e)'s reference to employees covered by "other personnel systems" illustrates a critical point. Congress had no problem with the fact that what the court below characterizes as the "broad definitional provisions in the statute" would be extending grievance arbitration rights to employees even if they did not have Chapter 43 and Chapter 75 MSPB appeal rights, and even if they did not have any alternate appeal rights (see 5 U.S.C. 7121(e) which provides that in matters similar to those covered by Chapters 43 and 75, employees covered by

[6] Section 7121(f) concerns judicial review of arbitration decisions. Treasury suggests (Resp. Br. 12 n.10) that that section might subject arbitration decisions over adverse actions taken against excepted service employees to review by the Federal Circuit. There is no support for this novel interpretation, raised for the first time in this footnote. As Treasury recognizes (Resp. Br. 12 n.10), both the Authority and the court below interpret the Statute in a manner that would preclude judicial review in such cases.

other personnel systems may raise them either under the negotiated grievance procedure, or the appellate procedures, *if any*, applicable to those matters). Thus, careful examination of Section 7121(e) actually demonstrates that the ruling of the court below is contrary to the specific intent of Congress. Congress's reference to employees under "other personnel systems" in Section 7121(e) shows that none of the policy concerns which prompted the court of appeals to negate the Statute's grievance arbitration rights for excepted service employees prompted Congress to negate those rights for a group of employees who—in all other respects—receive less protection from Congress than do excepted service employees.

3. Finally, the fact that Congress is currently considering legislation which would give excepted service employees the right to appeal certain disciplinary actions to the MSPB should not affect the Court's decision with regard to this petition for a writ of certiorari. It is obvious that there can be no guarantee such legislation will be enacted, thus mooting the issue here. Whether excepted service employees should be given appeal rights to MSPB is a political question to be decided by Congress and the President. By contrast, this case presents a live question as to the nature and extent of existing statutory rights pertaining to a significant segment of the federal workforce. For the reasons above and those in the Authority's petition, that question should be answered by this Court.[7]

---

[7] The Acting Solicitor General authorizes the filing of this Reply Memorandum by the Federal Labor Relations Authority.

Respectfully submitted.

WILLIAM E. PERSINA *
Solicitor

ARTHUR A. HOROWITZ
Associate Solicitor

ROBERT J. ENGLEHART
JAMES F. BLANDFORD
Attorneys

* Counsel of Record

JANUARY 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 254941 62091